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OPINION	:	No. 83-805
	:	
of	:	<u>JANUARY 24, 1984</u>
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THE HONORABLE RALPH J. GAMPELL, DIRECTOR,
ADMINISTRATIVE OFFICE OF THE COURTS, has requested an opinion on the
following question:

Is a justice court judge who takes a deferred retirement under a county
retirement system and who subsequently withdraws his funds from the retirement system
still deemed to be a retired judge who is eligible for judicial assignments?

CONCLUSION

A justice court judge who takes a deferred retirement under a county
retirement system and who subsequently withdraws his funds from the retirement system
is no longer deemed to be a retired judge who is eligible for judicial assignments.

ANALYSIS

Article VI, section 6, of the California Constitution provides in part:

"The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired who consents may be assigned to any court." (Emphasis added.)

Our opinion is requested as to whether a justice court judge who takes a deferred retirement under a county retirement system and who subsequently withdraws his funds from the retirement system is still deemed to be a "retired judge" within the meaning of article VI, section 6, so as to be available for judicial assignments. We conclude that the answer is "no."

Judges of courts of record come within the provisions of the "Judges Retirement Law," Government Code section 75000.¹ Accordingly, justice court judges are excluded from that retirement system. (See § 75002.) Such judges may, however, be members of a county retirement system under the County Employees Retirement Law of 1937, section 31450 et seq. (See § 31469, subd. (b).)

Sections 31700 through 31706 contain the provisions relating to deferred retirement for members of a county retirement system. Section 31700 provides for the specific election to take a deferred retirement upon leaving county service and section 31701 permits a member to rescind such election and withdraw all his accumulated contributions from the system.²

¹ All section references are to the Government Code unless otherwise indicated.

² Section 31700 provides:

"Any member, whether over or under the minimum age of voluntary service retirement, who leaves county service after completing five years of service or who leaves county service and within 90 days becomes a member of the Public Employees Retirement System^ or a retirement system established under this chapter in another county, may elect in writing, within 180 days after leaving county service, to leave his accumulated contributions in the retirement fund and be granted a deferred retirement allowance to become effective either:

"(a) Upon the option of the member, at any time at which he could have retired had he remained in county service in a full-time position, or

"(b) Not later than the first day of the month following that in which he attains the compulsory retirement age."

For purposes of article VI, section 6, of the California Constitution, it is clear from both the present statutory law and the history of that law that the *sine qua non* for status as a "retired judge" within the constitutional provision is a present pecuniary interest in a public retirement system. Accordingly, a "retired judge" within the meaning of the constitution is a judge who is presently receiving retirement benefits under such a system or who has a *present* right to receive such benefits at some future time.

Section 68549 has been enacted to implement article VI, section 6, with respect to the judicial assignment of retired judges. Subdivision (b) thereof[^] which was added in 1980 (Stats. 1980, ch. 51, § 2, p. 145) and amended in 1981 (Stats. 1981, ch. 417, § 1, p. 1617) designates those judges who are deemed to be "retired judges" for purposes of the constitutional provision. The section provides in full:

"68549. (a) A judge who has been defeated in an election for his or her office and who, before his term of office expires, elects to leave his or her accumulated contributions in the fund pursuant to Section 75033, or to receive benefits pursuant to Section 75033.5, shall not be deemed a retired judge within the meaning of Section 6 of Article VI of the California Constitution.

"(b) Except as provided in subdivision (a), any judge whose position is terminated by court annexation, merger[^] closure, or consolidation, or who

Section 31701 provides:

"Any member may elect to rescind in writing his election and withdraw his accumulated contributions pursuant to Section 31628 at any time before the effective date of his retirement except that if within 90 days after discontinuing service under this system, he became a member of the State Employees' Retirement System or a system established in another county under this chapter, he may not rescind or withdraw any of his accumulated contributions while in service as such a member.

Section 31628 provides:

"If the service of a member is discontinued other than by death or retirement, upon proper application submitted to the county treasurer, he shall be paid all of his accumulated contributions, in accordance with the provisions of this act, minus a withdrawal charge, if a withdrawal charge has been provided for by the regulations of the board. The board may order payment in whole or in part withheld for a period not to exceed six months after date of separation. If a member does not file the proper application, the county treasurer shall send to such member, not more than 90 days after termination of service, at his last known address, a registered or certified letter, return receipt requested, stating that he has money to his credit on the books of the retirement system and that if he does not claim such money within 10 years after date of notice, such money will be deposited in and become a part of the current pension reserve fund."

retires or resigns from office, *and who has a vested interest under a public employees retirement system as a result of service as judge*, and who has been a member of the State Bar for at least five years or who has served as a judge of a court of record, *shall be deemed a retired judge within the meaning of Section 6 of Article VI of the California Constitution.*" (Emphasis added.)

Thus, under the statutory law the *sine qua non* for "retired judge" status is possession of a "vested interest" in a public employees' retirement system resulting from judicial service. Clearly, a justice court judge who elects to take a deferred retirement under section 31700 and who subsequently elects to withdraw his accumulated contributions would thereafter not qualify as a "retired judge" under section 68549, subdivision (b). He would not only no longer have a present vested interest in the retirement system, but he would have no present interest at all, vested or contingent. This is so since the law contains no provision for such a judge to reenter the retirement system unless he should reenter county service. (See generally, §§ 31640-31656.)

The requirement that to be considered a "retired judge" for purposes of article VI, section 6, a former judge must have an interest in a public retirement system is consonant with the history of the assignment of retired judges to the bench. This history through the year 1976, at least with respect to judges of courts of record, is discussed at length in 59 Ops.Cal.Atty.Gen. 177 (1976).

Reference is made to that opinion for further detail. Suffice it to say that the progression has been as follows:

1. Prior to the adoption of any constitutional provision for the assignment of retired judges to the bench, such assignments were provided for in the Judges' Retirement Law as to judges who were actually retired and who were receiving benefits under that law. Such provision was held to be proper in *Pickens v. Johnson* (1954) 42 Cal.2d 399 as being authorized under the Legislature's constitutional power to establish a system of retirement for judges. As stated by the court:

"So here the Constitution has in general terms conferred upon the Legislature the power to establish a system for the retirement of judges. The Legislature has done so and has imposed as a condition of retirement that retired judges, *so long as they receive retirement allowances*, shall continue to be judicial officers of the state and with their permission shall be subject to call for judicial services by assignment for that purpose by the chairman of the Judicial Council." (*Id.* at pp. 404-405; emphasis added.)

2. In 1960 express power to assign retired judges to the bench was added to the California Constitution, but in no way altering "the basic rationale in *Pickens*, i.e., that the Legislature has plenary authority to invoke the assistance of retired judges as consideration for their retirement allowance . . . and retains the power to define which judges are retired within the meaning of Constitution article VI, section 6 (59 Ops.Cal.Atty.Gen. 177, 179, *supra*.)

3. Until 1973 only judges who were actually receiving retirement benefits' were assigned to the bench since, under the Judges' Retirement Law, only those judges were deemed to be "retired" under that law.

4. Subsequently, *certain* judges who elected a deferred retirement were, under section 75033.5 (added Stats. 1973, ch. 1102), deemed to be retired under the Judges' Retirement Law at the time they elected to leave their contributions in the retirement system. These judges, since they were "retired," were considered available for judicial assignment although their receipt of any benefits was still in the future.

5. In 1977 the Legislature, apparently in response to our 1976 opinion which pointed out the anomaly in not having all judges who elected to take a deferred retirement available for judicial assignment, amended section 75033 to rectify this problem, thus making all such judges "retired judges." (See Cal.Atty.Gen.Unpub.Opn. I.L. 78-27.)

With respect to justice court judges, much of the background history regarding their assignment under article VI, section 6, as "retired judges" can be found in *Stewart v. Bird* (1977) 100 Cal.App.3d 215, which also antedated the addition of subdivision (b) of section 68549, *supra*, which designates who are deemed to be "retired judges."

That case rejected the plaintiff's contention that he was a "retired judge" available for judicial assignment where he merely served as a justice court judge but was not a member of *any* public retirement system and hence was neither receiving nor had ever received any retirement benefits. The defendants Chief Justice and Judicial Council had apparently informed the plaintiff that he was not eligible for assignment because he was not participating in the *Judges' Retirement System*, which is applicable only to judges of courts of record.

The court acknowledged that since 1961 justice court judges were apparently eligible to be assigned to sit as "retired judges." This was due to the addition of the basic constitutional provision and certain statutory changes made at that time. These were the repeal of section 75081 (the original "tie-in" to the Judges' Retirement System) and the

addition of section 68543.5, which specifically contemplates assignment of justice court judges in discussing the compensation that retired judges are to receive.

The court, however, still concluded that a "retired judge" at *all levels* was one who was retired and participating in a public retirement system. The court thus held:

"We conclude that although the Legislature did amend the Government Code to provide for the assignment of retired justice court judges, it did limit eligibility for assignment to those former justice court judges who are 'retired.' In order for a former justice court judge to be retired and hence eligible for assignment, he must have met the age and length of service requirements of the retirement plan of the county in which he was employed and have withdrawn from active service with a retirement allowance. Since plaintiff has not met these requirements he is not eligible for assignment under Government Code section 68543.5." (*Id.*, at p. 220.)

Thus, it is seen that prior to the enactment of subdivision (b) of section 68549 specifically defining "retired judges" for purposes of article VI, section 6, it was the interpretation and practice to consider only those judges who were retired under a public retirement system and accordingly were either receiving benefits or would receive them at some future time as available for judicial assignment. Section 68549, subdivision(b), in requiring a "vested interest" in a public retirement system, has essentially merely codified the prior law in this respect.

In short, the mere fact that a judge leaves office does not mean that such judge is a "retired judge" for purposes of article VI, section 6. There is a requisite nexus between the judge and a public retirement system to invest the judge with such status. Accordingly, a justice court judge who initially takes a deferred retirement when he leaves the bench but subsequently elects to withdraw his accumulated contributions, and hence withdraws himself from the county retirement system, is not a "retired judge" who is available for judicial assignment.
